

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>TIMOTHY BAILEY</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 176,556
<b>THE BOEING COMPANY - WICHITA</b>	)	
Respondent	)	
AND	)	
	)	
<b>AETNA CASUALTY &amp; SURETY</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Respondent appeals an Award of Administrative Law Judge John D. Clark dated August 10, 1995. Oral argument was held before the Workers Compensation Appeals Board by telephone conference.

**APPEARANCES**

Claimant appeared not having resolved this matter with the respondents prior to oral argument before the Appeals Board. Respondent and its insurance carrier appeared by and through their attorney, Vaughn Burkholder of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Kendall R. Cunningham of Wichita, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

### **ISSUES**

What, if any, is the liability of the Kansas Workers Compensation Fund for the injury suffered to claimant's upper extremities and his low back?

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a several year employee with respondent, suffered injury to his upper extremities beginning January 1992. He was treated by James Gluck, M.D., who first saw him on June 18, 1992. Claimant's symptomatology to his upper extremities continued to worsen. Claimant was taken off work June 5, 1992, after suffering an injury to his low back. He thereafter underwent treatment for both the low back through other surgeons and continued treatment for the upper extremities with Dr. Gluck. Electrodiagnostic studies done on June 18, 1992, indicated a slowing of the conduction velocities across the left elbow consistent with mild ulnar nerve compression. Surgery on the elbow was performed on October 5, 1992.

While claimant was undergoing treatment with Dr. Gluck for his upper extremities, he was being treated by Stephen Ozanne, M.D., for his low back symptomatology. Dr. Ozanne first saw claimant on June 19, 1992. After reviewing the results of an MRI Dr. Ozanne diagnosed a herniated disc at the L5-S1 level with mild desiccation at the same level. He was taken off work by both Dr. Gluck and Dr. Ozanne. On September 15, 1992, claimant underwent an L5-S1 discectomy which resulted in a reduction in claimant's symptoms. He was returned to light duty with restrictions in February, 1993. He continued working through June 8, 1993, at which time he was forced to quit due to his ongoing difficulties. Claimant testified that his upper extremity symptomatology continued to worsen after returning to work in February 1993. Claimant felt that his back had gotten somewhat worse since returning to work but his arms and hands were considerably worse, with numbness in both hands up to his elbows. Claimant was provided additional restrictions in May, 1993, which his employer was unable to accommodate. Claimant has not worked since leaving Boeing in June 1993.

The only issue before the Workers Compensation Appeals Board is whether the Workers Compensation Fund should bear any of the responsibility for the injuries to claimant's upper extremities and his low back as described above. The Administrative Law Judge found that respondent had not sustained its burden concerning Fund liability for either the injury to claimant's upper extremities or his back. He felt that prior to the dates of accident, respondent had no knowledge of problems with claimant's back or arms and,

thus, it would be impossible for respondent to have knowingly retained a handicapped employee.

The purpose of the Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments by relieving employers, wholly or partially, of Workers Compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 1991 Supp. 44-567(b); Morgan v. Intercollegiate Press, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765 (1976).

K.S.A. 1991 Supp. 44-567(b) provides in part:

“In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge.”

The employer has the burden of proving that it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

K.S.A. 1991 Supp. 44-567(a) goes on to state in part:

“(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers’ compensation fund; and

“(2) Subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director finds the injury probably or most likely would have been sustained or suffered without regard to the employee’s preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the director shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee’s preexisting physical or mental impairment, and the amount so found shall be paid from the workers’ compensation fund.”

Respondent contends that claimant suffered pre-existing problems to his back as early as 1990, when claimant suffered an injury at the L5-S1 level. X-rays taken at that time indicated arthritis of the lumbo-sacral spine with Schmorl’s nodes, scoliosis, pelvic,

posterior settling of L5-S1 and a thinning of the L5-S1 disc. Respondent filed a Form 88 Notice of Handicapped or Disabled Employee on August 30, 1990, for the arthritis and physical deformities of the spine. Both Dr. Ernest Schlachter and Dr. Kenneth Zimmerman stated that "but for" the prior thinning of the disc at the L5-S1 level claimant would not have developed the herniation from the trauma in 1992. Dr. Schlachter was deposed by the Workers Compensation Fund in a second deposition on December 14, 1993. At that time he was asked to review x-rays taken in 1990. Dr. Schlachter felt that the x-rays did not show the significant degeneration discussed by Dr. Zimmerman in his earlier deposition. Dr. Schlachter did agree that if Boeing interpreted the x-rays in that fashion they would have knowingly hired or retained a handicapped employee at that time. Dr. Schlachter also stated that the MRI taken June 10, 1992, five days after claimant's June 5 back injury, showed a desiccation of the disc. He felt that the degeneration present in the disc would have been present from six months to a year prior to the MRI being taken. The Appeals Board acknowledges there is some dispute regarding whether claimant had any significant problem in 1990, specifically regarding whether the doctors in Boeing Central Medical misread the x-rays. Nevertheless there is sufficient medical evidence in the file to convince the Appeals Board that in 1990 claimant was a handicapped employee as defined by K.S.A. 1991 Supp. 44-566. As such, with regard to claimant's low back injury suffered on June 5, 1992, the Appeals Board finds the Kansas Workers Compensation Fund should be responsible for the total award. As to this issue, the Award of the Administrative Law Judge is reversed.

With regard to claimant's upper extremity symptomatology it is significant that claimant originally alleged injury from January, 1992, and a series of injuries through June 5, 1992. Claimant underwent surgeries subsequent to that time to his left elbow and was placed back to work at Boeing with specific restrictions to the upper extremities. Unfortunately claimant was returned to work at a job which exceeded his abilities. Dr. Gluck, the treating physician, acknowledged that claimant was capable of returning to work using a rivet gun or other vibratory tools for no more than 30 to 45 minutes at a time and no more than four hours per day. He felt that if claimant was capable of returning without increased symptomatology he could continue doing his job. He cautioned that if claimant returned to work and developed additional problems or increased symptomatology, these restrictions would probably have to be changed.

Dr. Gluck opined that after claimant returned to work at Boeing, his left ulnar nerve and carpal tunnel symptoms were exacerbated but he did not think the underlying problems were changed. His testimony is disputed by both Dr. Schlachter and Dr. Zimmerman. Dr. Schlachter felt claimant returned to work with a 6 percent permanent partial impairment of function to the body as a whole for the upper extremity complaints. Subsequently Dr. Schlachter felt claimant's functional impairment increased to 14 percent to the body as a whole due to the reinjury suffered from February, 1993, through claimant's last date of employment, June 8, 1993.

Dr. Gluck did not diagnose carpal tunnel syndrome nor did he operate for it but the symptoms developed by claimant through June 8, 1993, indicated that claimant did have overuse syndrome and possible carpal tunnel syndrome.

Claimant's testimony also contradicted the opinion of Dr. Gluck. Claimant testified that he had a significant worsening of his upper extremity symptomatology after returning to work with Boeing in January, 1993.

Respondent argued, with regard to claimant's upper extremity complaints, that claimant's 1988 motorcycle accident and a 1988 incident where claimant drilled a bit into his hand, created a preexisting handicap situation which would result in some Fund liability. The medical evidence was not sufficient to show that claimant was sufficiently injured by either situation for the injuries to claimant's upper extremities to constitute a handicap in his ability to obtain or retain employment. However, at the regular hearing, claimant's date of accident which was originally alleged through 1992, was amended, to cover the period February 16, 1993 through claimant's last date of employment, June 8, 1993.

Based upon the testimony of Dr. Zimmerman and Dr. Schlachter and the testimony of claimant regarding the worsening of his condition the Appeals Board finds that claimant suffered additional injury to his upper extremities during the period February, 1993, through June 8, 1993.. The only medical evidence which deals with this time frame is that of Dr. Schlachter. Dr. Schlachter's medical testimony that claimant had a 6 percent impairment as a result of the injuries to the claimant's upper extremities through June 5, 1992, is accepted by the Appeals Board as appropriate. Subsequent to that time claimant suffered a worsening of his conditions and the upper extremity functional impairment increased to 14 percent to the body as a whole.

The Appeals Board finds, based upon the evidence in the record, that claimant was a handicapped employee at the time of his return to work with respondent in February, 1993. It also finds that the injury to claimant's upper extremities in 1993 probably or most likely would have been sustained without regard to claimant's preexisting physical impairment but that there was a contribution by this preexisting impairment to claimant's condition. The medical evidence of Dr. Schlachter indicates that claimant suffered a 6 percent permanent impairment of function to the body as a whole prior to claimant's having become a handicapped employee. Respondent will be responsible for this portion of claimant's impairment. Subsequent to claimant's return to work claimant's condition increased to 14 percent to the body as a whole. This increased portion of claimant's impairment will be the responsibility of the Kansas Workers Compensation Fund. In reviewing the evidence the Appeals Board finds, that the Kansas Workers Compensation Fund shall be responsible for 57 percent of the total impairment suffered by claimant to his upper extremities, with respondent being responsible for the remaining 43 percent of the total impairment.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated August 10, 1995, should be, and is hereby reversed and the respondent, Boeing Military Airplanes and its insurance company, Aetna Casualty & Surety Co., are entitled to a reimbursement from the Kansas Workers Compensation Fund for 100 percent of the cost associated with the injury to claimant's low back occurring on June 5, 1992. In addition, respondent and its insurance carrier are entitled to a reimbursement for 57 percent of the expenses and costs associated with the injuries suffered to claimant's upper extremities as a result of the injuries occurring through June 5, 1992, and the series of injuries suffered by claimant for the period February, 1993, through June 8, 1993.

By agreement of the respondent and the Workers Compensation Fund 50 percent of the costs associated with the litigation of this matter shall be split between the injuries to claimant's upper extremities and claimant's low back. A reimbursement from the Kansas Workers Compensation Fund for these costs shall be at the same level as the reimbursement ordered for claimant's back injuries and claimant's upper extremity injuries above designated.

The fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are assessed against the respondent, its insurance carrier, and the Kansas Workers Compensation Fund in accordance with the above findings to be paid as follows:

Barber & Associates	
Transcript of regular hearing	\$237.25
Deposition of Ernest R. Schlachter, M.D.	\$254.20
Ireland Court Reporting	
Transcript of continuation of regular hearing	\$160.00
Deposition of Timothy Bailey	\$160.00
Deposition of Ernest R. Schlachter, M.D.	\$132.50
Deposition of Jerry D. Hardin	\$315.00
Deposition Services	
Deposition of Kenneth D. Zimmerman, M.D.	\$312.40
Deposition of Stephen Ozanne, M.D.	\$184.00
Deposition of James Gluck, M.D.	\$169.00

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1996.

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BOARD MEMBER

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c: Vaughn Burkholder, Wichita, KS  
Kendall R. Cunningham, Wichita, KS  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Director